

PDZ LINES SDN BHD**A****v.****MASTER AGENCIES (M) SDN BHD****HIGH COURT SABAH & SARAWAK, KUCHING****B****RHODZARIAH BUJANG J****[CIVIL APPEAL NO: KCH 12B-46-2010]****25 JANUARY 2012**

CIVIL PROCEDURE: *Action - Limitation period - Third party proceedings - Whether respondent's claims against appellant ceased to exist upon expiry of one year period from date of delivery - Third party notice issued two years and four months after delivery of goods - Whether third party notice should not have been issued*

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CIVIL PROCEDURE: *Third party proceedings - Action - Limitation period - Whether respondent's claims against appellant ceased to exist upon expiry of one year period from date of delivery - Third party notice issued two years and four months after delivery of goods - Whether third party notice should not have been issued*

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The appellant was brought in as a third party by the respondent (transporter of goods) in an action where the respondent was sued for damages for frozen vegetarian food ('the said goods'). The appellant was the owner of the reefer container used to transport the said goods. It was not disputed that the cause of damage and loss to the said goods was because the temperature of the container was set at a wrong temperature. The respondent alleged that it was the appellant's negligence which caused the goods to be damaged. The Sessions Court Judge found for the respondent. Hence, this appeal. The appellant herein raised the issue of limitation, citing that cl. 4(G) of the Bill of Lading provides that a suit against the appellant must be brought within a period of nine months from the delivery of the goods or the date when the goods should be delivered. The evidence of DW2 showed that the container arrived at the plaintiff's premises on 22 October 2005. The food owner's action against the respondent was filed on 11 October 2006 although the statement of defence of the respondent was only filed on 11 October 2007. The third party notice, however, was only issued on 4 February 2008.

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A Held (allowing the appeal):

- (1) The contract between the parties, as embodied in the Bill of Lading, provides the limitation period and the relevant law governing the conduct of their business has an express stipulation on the time to sue. Thus, upon expiry of the one year period from the date of delivery of the container to the plaintiff, the respondent's claims against the appellant as the carrier ceased to exist and the third party notice should not have been issued in the first place. The third party notice against the appellant was only issued two years and four months after the delivery of the goods to the plaintiff. (paras 8 & 10-11)

Case(s) referred to:

- Aries Tanker Corp v. Total Transport Ltd* [1977] 1 All ER 398 (***foll***)
D *Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC (***dist***)
Owners Of The Ship or Vessel 'Kusu Island' v. The Owners Of Cargo Lately Laden On Board The Ship Or Vessel 'Brani Island' [1989] 2 CLJ 1306; [1989] 2 CLJ (Rep) 827 CA (***foll***)

E Legislation referred to:

Hague Rules, art. III of r. 6

For the appellant - Anastasia Chin; M/s Reddi & Co

For the respondent - Abang Halit Abang Malik; M/s Loke, King, Goh & Partners

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Reported by Suhainah Wahiduddin

JUDGMENT

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Rhodzariah Bujang J:

- [1] The appellant in this case was brought in as third party by the respondent in an action where the respondent was sued for damages for the frozen vegetarian food it ordered from Johor. The respondent was the transporter of the goods and the appellant was the owner of the reefer container which was used to transport the goods. It was not disputed that the cause of the damage and loss to the said goods was because the temperature of the container was set at +20°C and not -20°C as was the

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requirement to keep the frozen food stuff in good condition. The respondent was found liable on 25 February 2010 after a full trial by the Sessions Court of the claim, in an action filed by the owner of the said goods.

[2] The third party notice against the appellant was issued on 4 February 2008. The respondent's main allegation was that it was the appellant's negligence which caused the wrong temperature to be set, which allegation the appellant obviously denied. The learned Sessions Court Judge however found for the respondent after a full trial. Hence, the appeal now against her finding.

[3] I find it expedient to dispose of this appeal on this issue of limitation raised and pleaded by the appellant. The defence of limitation raised is two pronged. The first is under the bill of lading and the second, under the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea to Liability of Shipowners and Others) Regulations 1960 ("the regulations").

Limitation Under The Bill Of Lading

[4] Clause 4(G) of the Bill of Lading (exh. PT1 and appearing at p. 339 of the appeal record) provides that a suit against the appellant must be brought within a period of nine months from the delivery of the goods or the date when the goods should have been delivered. The evidence of one Lim Foot Ring (DW2) at the trial as stated in his witness statement (exh. D6) shows that the container arrived at the plaintiff's premises on or about 22 October 2005. The food owner's action against the respondent was filed on 11 October 2006 although the statement of defence of the respondent was only filed on 11 October 2007. But, as stated earlier, the third party notice was only issued on 4 February 2008.

Limitation Under The Regulations

[5] Under s. 6 of art. III to the schedule of the regulations, the limitation period for a suit to be brought against the carrier is one year after delivery of the goods or the date when the goods should have been delivered.

A [6] The appellant's counsel's argument is that the word "suit"
in these two provisions include third party proceedings, going by
the definition in the Sarawak Limitation Ordinance which defined
"suit" to mean any action or other proceeding. Counsel also cited
a Singapore's Court of Appeal case of *Owners Of The Ship or*
B *Vessel 'Kusu Island' v. The Owners Of Cargo Lately Laden On Board*
The Ship Or Vessel 'Brani Island' [1989] 2 CLJ 1306; [1989] 2
CLJ (Rep) 827 in which a similar limitation provision was stated
in the bill of lading and in a provision in Singapore's Carriage of
Goods by Sea Act.

C [7] Against that argument, the respondent's counsel both in the
court below and before me submitted a decision of the Supreme
Court in *Mat Abu Man v. Medical Superintendent, General Hospital*
Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 in
D which it was held that "third party proceedings for contribution"
is independent of and separate from the main proceedings between
the plaintiff and the defendant. Further it was held that in respect
of this kind of proceedings, time begins to run from the date the
defendant is found liable by the court. The learned Sessions Court
E Judge actually relied on this very case to dismiss the appellant's
defence on limitation.

[8] With respect, I think the Supreme Court's case is
distinguishable because it deals with third party proceedings where
no specific limitation period has been prescribed for the parties in
F dispute. In this case, not only does the contract between the
parties, as embodied in the bill of lading provides the limitation
period, the relevant law governing the conduct of their business
has an express stipulation on the time to sue.

G [9] The Singapore Court of Appeal in the cited case referred to
the judgment in the House of Lords in *Aries Tanker Corp v. Total*
Transport Ltd [1977] 1 All ER 398 in which the House of Lords
held that the limitation period found in art. III of r. 6 of the
Hague Rules created a time-bar of "a special kind", one which
H extinguished the claim and not one which merely barred the
remedy while leaving the claim intact. The House of Lords further
held that upon expiry of the time limited to sue the claim for the
loss of cargo in that case "ceased to exist in law ...

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[10] I am of the view that the expression of the law indicated and adopted in these foreign cases are to be preferred in this case because it deals with the same facts, *viz*, limitation period in a bill of lading and in a law legislated specifically for carriage of goods by sea. They are, in my view, highly persuasive. Thus, upon expiry of the one year period from the date of delivery of the container to the plaintiff, the respondent's claims against the appellant as the carrier ceased to exist and the third party notice should not have been issued in the first place.

[11] For this reason and on the issue of limitation, I agree to allow the appeal since the third party notice against the appellant was only issued two years and four months after the delivery of the goods to the plaintiff on 22 October 2005. I would fix the cost of this appeal at RM2,000.

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